No. 9726

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SUN CHONG LEE alias COLONEL LEE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR APPELLEE.

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JURISDICTION.

Title 18, United States Code, Section 401 confers jurisdiction upon the District Court, and Title 28, United States Code, Section 225 grants appellate jurisdiction to this Honorable Court.

STATEMENT OF FACTS.

This is an appeal from a judgment of the United States District Court for the Territory of Hawaii whereby the appellant was sentenced to pay a fine of five hundred dollars ($500.00) and to serve three (3)

months in the city and county jail at Honolulu, T. H., on count I of the Indictment returned against him, and the imposition of sentence was suspended on count II of the indictment and the appellant was placed on probation for the period of three (3) years. (R. 11.)

The indictment upon which the above judgment was based was filed in the United States District Court for the Territory of Hawaii on August 15, 1940. (R. 2.) This indictment charged in two counts violations of Sections 398 and 399, Title 18 of the United States Code.

Count I of the indictment was based on Section 399, Title 18, United States Code (R. 3, 4) and alleged that appellant and others induced one Nancy O'Connor to go from Honolulu, City and County of Honolulu, Territory of Hawaii, to Wailuku, Island and County of Maui, Territory of Hawaii, "to engage in prostitution and debauchery and other immoral practices; and that the said defendants * * * in furtherance of such purpose * * * knowingly, wilfully, unlawfully and feloniously did transport and cause to be transported the said Nancy O'Connor from Honolulu aforesaid to Wailuku, Island and County of Maui, Territory of Hawaii, as a passenger upon the Inter-Island Airways, Ltd. * * *" contrary to the form of the statute, etc. (R. 3, 4.)

Count II of the indictment was based on Section 398, Title 18, United States Code (R. 4, 5), and alleged that the appellant and others knowingly, wilfully, unlawfully and feloniously transported and aided and as-

sisted in obtaining transportation for and in transporting the said Nancy O'Connor from Honolulu, City and County of Honolulu, Territory of Hawaii, to Kihei, Island and County of Maui, Territory of Hawaii, for the purpose of prostitution and other immoral purposes. (R. 4, 5.)

Prior to the entry of a plea, the appellant filed a demurrer to the indictment. (R. 5-7.) The grounds of demurrer were: (1) that count I of the indictment was insufficient in that it did not "appear in said count the manner or means used and employed in connection with the transportation of the said Nancy O'Connor from Honolulu to Wailuku or whether said transportation occurred over the route of a common carrier or otherwise" (R. 6); and (2) "that Title 18, Section 403, U. S. Code excludes the Territory of Hawaii from the provisions of Section 399 and Section 398, Title 18, U. S. Code, in their intra-territorial application". (R. 7.)

The Court overruled the demurrer. (R. 8.) Thereafter the appellant entered a plea of not guilty, and on August 28, 1940, the case came on for trial; the case went to the jury and the appellant was convicted on both of said counts in the indictment. (R. 8.) Following the verdict, the appellant was sentenced as mentioned above.

SUMMARY OF ARGUMENT.

The only question involved in reference to this appeal is whether count I of the indictment suffi-

ciently alleges that the transportation of the woman named from Honolulu to Wailuku, Island of Maui, was by common carrier under Section 399, Title 18, United States Code. This question is presented in Assignments of Error Nos. II and III.

Under Assignment of Error No. IV appellant contends that Section 403, Title 18, United States Code, excludes the Territory of Hawaii from the provisions of Sections 398 and 399, Title 18, United States Code. This contention is frivolous and should not be considered by this Honorable Court.

ARGUMENT.

ASSIGNMENTS OF ERROR NOS. II AND III.

II. THE COURT DID NOT ERR IN HOLDING AND FINDING (BY OVERRULING THE DEMURRER HEREIN) THAT THE CHARGE CONTAINED IN COUNT ONE OF THE INDICTMENT SUFFICIENTLY CHARGED A CRIMINAL OFFENSE UNDER SECTION 399, TITLE 18, UNITED STATES CODE, AND SUFFICIENTLY CHARGED IN SAID COUNT THAT THE TRANSPORTATION COMPLAINED OF THEREIN OCCURRED OVER THE ROUTE OF A COMMON CARRIER.

III. THE COURT DID NOT ERR IN OVERRULING THE DEMURRER WITH RESPECT TO COUNT ONE OF THE INDICTMENT.

The above assigned Errors, Nos. II and III, will be discussed together since they involve the same question.

Count I of the indictment is based on Section 399, Title 18, United States Code, quoted in full in the Appendix, the pertinent part of which is as follows:

"and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any Territory or the District of Columbia, shall be deemed guilty of a felony * * *."

Count I of the indictment (R. 2-4) reads as follows:

"COUNT I

The Grand Jurors of the United States, empaneled, sworn and charged at the term aforesaid, of the Court aforesaid, on their oath present that

Penny Owens,

Sun Chong Lee alias Colonel Lee alias S. C. Lee, and Anne Lewis alias Buddy alias Buddy Wilson alias Anna Read alias Anne Miller alias Cuma Anne Lewis alias Cuma Anne Okamura,

(hereinafter called Defendants), or or about the 5th day of June, 1940, at and within the Territory and District of Hawaii and within the jurisdiction of this Court, jointly, knowingly, wilfully, unlawfully and feloniously did persuade, induce, entice and coerce a certain woman, to-wit: Nancy O'Connor, to go from Honolulu, City and County of Honolulu, Territory of Hawaii, to Wailuku, Island and County of Maui, Territory of Hawaii, with the intent and purpose in them, the said defendants, to induce and coerce her, the said Nancy O'Connor, and that she should be induced and coerced to engage in prostitution and debauchery and other immoral practices; and that the said defendants then and

there and in furtherance of such purpose jointly, knowingly, wilfully, unlawfully and feloniously *did transport and cause to be transported the said Nancy O'Connor from Honolulu aforesaid to Wailuku, Island and County of Maui, Territory of Hawaii, as a passenger upon the Inter-Island Airways, Ltd.,* contrary to law and to the form of the Statute in such case made and provided and against the peace and dignity of the United States of America." (Emphasis added.)

This count of the indictment contains all of the necessary elements of the offense required under section 399, and the rule as to the test of the sufficiency of an indictment as stated by the United States Supreme Court and other Courts on the subject.

In *Hagner v. United States,* 285 U. S. 427, the sufficiency of an indictment was challenged on the ground that it failed to allege specifically that the defendant did "cause (the letter) to be delivered by mail according to the address thereon," as provided in the statute. The Court held the indictment sufficient, saying:

> "Obviously, in this particular, the indictment does not precisely follow the terms of the statute, but it does allege that the letter was deposited in a post office so addressed as to constitute a direction for its delivery to the addressee * * *
>
> "While, therefore, the indictment does not in set terms allege delivery of the letter, a presumption to that effect results from the facts which are alleged.
>
> "The rigor of old common law rules of criminal pleading has yielded, in modern practice,

> to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' "

In *United States v. Behrman,* 258 U. S. 280, the Court said:

> "It is enough to sustain an indictment that the offense be described with sufficient clearness to show a violation of law, and to enable the accused to know the nature and cause of the accusation and to plead the judgment, if one be rendered, in bar of further prosecution for the same offense."

And in *Cohen v. United States,* 294 Fed. 488 (C. C. A. 6, 1923), certiorari denied 264 U. S. 584, the sufficiency of an indictment was attacked for the reason that it was not in the exact language of the statute. In holding the indictment sufficient, the Court said:

> "The sufficiency of an indictment, especially after conviction, is no longer tested by the nicety of expression once required, and if by fair and reasonable construction it alleged every essential element to make out the crime it is sufficient."

In *Tatum v. United States,* 110 F. (2d) 555 (C. C. A. Dist. Columbia), the defendant was convicted of assault with a dangerous weapon; the indictment charging that she made the assault "with a certain corrosive liquid compound commonly * * * called lye." The statute provided that assault "with dangerous weapon" and the sufficiency of indictment was contested in that it did not state that lye was a dangerous weapon. The Court held the indictment sufficient, saying:

> "An indictment which 'contains the elements of the offense intended to be charged', shows what the defendant must be prepared to meet, and precludes later prosecution for the offense, is good, although it does not precisely follow the language of the statute * * * The sufficiency of a criminal pleading is to be determined by practical, rather than technical, considerations."

In *Hughes v. United States,* 114 F. (2d) 285 (C. C. A. 6, 1940), the defendant appealed from a conviction upon three counts of an indictment charging violations of the Mann Act. (Title 18, U. S. C. secs. 398 and 399.) The defendant demurred to the indictment, one of the grounds of demurrer being that the indictment was so indefinite and uncertain that it failed to state facts sufficient to constitute a crime, in that it failed to specify the common carrier or the route thereof. The demurrer was overruled. Upon appeal the Court held this count of the indictment sufficient, saying:

> "The true test of the sufficiency of the indictment is whether it contains the elements of the

> offense intended to be charged, and sufficiently apprises the accused of what he must be prepared to meet, so that the judgment may be a bar to further proceedings aaginst him for the same offense."

While it is true that count I of the indictment here does not in precise terms allege that the "Inter-Island Airways, Ltd.," was a common carrier, it does allege that the woman named was transported "as a passenger upon the Inter-Island Airways, Ltd." and sufficiently apprised the appellant of the charge against him; that the allegation was sufficient that a judgment under the indictment would be a bar to any subsequent prosecution should he again be questioned on the same grounds.

In this connection also reference is made to section 556, Title 18, United States Code, which provides, in part, as follows:

> "No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant * * *"
>
> "This section was enacted to the end that, while the accused must be afforded full protection, the guilty shall not escape through mere imperfections of pleading."
>
> *Hagner v. United States*, 285 U. S. 427;
>
> *Hewitt v. United States,* 110 F. (2d) 1, 6 (C. C. A. 8, 1940).

In *Hewitt v. United States,* supra, it was held that the allegation in an indictment charging robbery of a state bank, and that the bank was a member of the Federal Deposit Insurance Corporation did not make the indictment fatally defective, though the indictment should have alleged that the bank was a state bank, the deposits of which were insured by the corporation. The Court saying:

> "The sufficiency of an indictment should be judged by practical, and not by technical considerations. It is nothing but the formal charge upon which an accused is brought to trial * * * an indictment which fairly informs the accused of the charge which he is required to meet and which is sufficiently specific to avoid the danger of his again being prosecuted for the same offense should be held good. It is our opinion that the indictment in suit omitted no essential element of the offenses sought to be charged, but that an essential element was imperfectly, inartificially and loosely stated."

And, as stated by Mr. Justice Sutherland in *Hagner v. United States,* 285 U. S. 427, while it is not the intent of section 556, Title 18, U. S. C., to dispense with the rule which requires that the essential elements of an offense must be alleged; this section authorizes the Courts to disregard merely loose or inartificial forms of averment. The Court saying,

> "Upon a proceeding after verdict at least, no prejudice being shown, *it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment. In the absence of the evidence*

and the charge of the court, we are free to assume that every essential element of the offense was sufficiently proved * * * The contrary of neither of these propositions is asserted." (Emphasis added.)

The allegation that the transportation by the Inter-Island Airways, Ltd., was by common carrier was well understood by the appellant; the defendant could not have been misled to his prejudice by such an allegation. The judgment should not be reversed on account of a defect so obviously technical. It would give an unnecessary strictness to the language of the indictment to hold it insufficient, or to hold that it failed to inform the defendant exactly of what he was accused, or lacked that precision and certainty of description which would enable him to always use the judgment as a bar to any other prosecution—which is the substantial purpose of a written charge.

None of the cases ctied by appellant is in point. In *Sloan v. United States,* 287 F. 91, a violation of section 399 was not charged or involved in the case; in *Alpert v. United States,* 12 F. (2d) 352, the allegation was that the transportation was by automobile and the Court held that the evidence did not support the conviction that the automobile was a common carrier; in *Blain v. United States,* 22 F. (2d) 393, the indictment was under section 398 of the act; in *Coltabellotta v. United States,* 45 F. (2d) 117, the sufficiency of the indictment was not challenged, but involved the sufficiency of the evidence to sup-

port the conviction, and also in *United States v. Saledonis,* 93 F. (2d) 302, the sufficiency of the indictment was not involved.

ASSIGNMENT OF ERROR NO. IV.

IV. THE COURT DID NOT ERR IN OVERRULING THE DEMURRER THAT SECTION 403, TITLE 18, UNITED STATES CODE EXCLUDED THE TERRITORY OF HAWAII FROM THE PROVISIONS OF SECTIONS 398 AND 399, TITLE 18, UNITED STATES CODE, WITH RESPECT TO INTRA-TERRITORIAL TRANSPORTATION.

Appellant's contention that section 403, Title 18, United States Code, excludes the Territory of Hawaii from the provisions of sections 398 and 399, Title 18, United States Code, is without merit and should not be considered by this Honorable Court. This is obvious from a reading of the statute itself, which provides, in part, as follows:

> "The term 'Territory', as used in sections 397 to 404 of this title shall *include* the District* of Alaska, the insular possessions of the United States, and the Canal Zone * * *
>
> "*'District' should be 'Territory.'" (Emphasis added.)

On June 25, 1910, when the "White Slave Traffic Act" (Secs. 397-404, Title 18, U. S. C.) was enacted Alaska was not a Territory (48 U. S. C., sec. 21), and section 403 merely extended the provisions of the Act to "include" the "District of Alaska".

ASSIGNMENT OF ERROR NO. I.

I. THE COURT DID NOT ERR IN OVERRULING THE DEMURRER INTERPOSED HEREIN BY THE DEFENDANT, SUN CHONG LEE, ALIAS COLONEL LEE.

This assignment of error has been covered under the argument of Assignments of Error II and III.

CONCLUSION.

The appellee respectfully submits that the indictment herein sufficiently described the offense charged to enable him to make his defense and to plead the judgment in bar of any further prosecution for the same crime; further, the Court did not err in ruling that section 403 did not exclude the Territory of Hawaii from the provisions of the act.

Dated, Honolulu, T. H., August 19, 1941.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Section 398, Title 18, United States Code;

§398. Same; transportation of woman or girl for immoral purposes, or procuring ticket.

Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and

upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court. (June 25, 1910, c. 395, § 2, 36 Stat. 825.)

Section 399, Title 18, United States Code;

§399. Same; inducing transportation for immoral purposes.

Any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any Territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any Territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than $5,000, or by imprison-

ment for a term not exceeding five years or by both such fine and imprisonment, in the discretion of the court. (June 25, 1910, c. 395, § 3, 36 Stat. 825.)

Section 556, Title 18, United States Code; §556. Same; defects of form.

No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, or by reason of the attendance before the grand jury during the taking of testimony of one or more clerks or stenographers employed in a clerical capacity to assist the district attorney or other counsel for the Government who shall, in that connection, be deemed to be persons acting for and on behalf of the United States in an official capacity and function. (As amended May 18, 1933, c. 31, 48 Stat. 58.)

The receipt of a copy of the within and foregoing Brief for Appellee is hereby acknowledged this 19th day of August, 1941.

E. J. Botts per B. Gillette,
Attorney for Sun Chong Lee alias Colonel Lee, Appellant.